SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A.D. 1903.

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HOWE SCALE COMPANY OF 1886
AND FAY-SHOLES COMPANY,
Petitioners,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Respondent.

ANSWER TO PETITION FOR CERTIORARI.

EDMUND WETMORE,
HENRY D. DONNELLY,
Attorneys and of Counsel for Respondent.

PRESS OF
A. H. KELLOGG, NEW YORK

Supreme Court of the United States, 1

OCTOBER TERM A. D. 1903.

HOWE SCALE COMPANY of 1886 and FAY SHOLES COMPANY,
Petitioners,

vs.

WYCKOFF, SEAMANS & BENEDICT,
Respondent. 2

Answer to the petition for writ of certiorari, requiring United States Circuit Court of Appeals for the Second Circuit to certify to the United States Supreme Court for its review and determination, the case of Wyckoff, Seamans & Benedict, Complainant-Appellee, vs. Howe Scale Co., of 1886, Defendant-Appellant.

To the Supreme Court of the United States of America. 3

Now comes the Respondent, Wyckoff, Seamans & Benedict, a corporation created and existing under the laws of the State of New York, and for an answer to the petition herein, says as follows:

4 1. That this Respondent was created by the laws of the State of New York in 1892, and is the lawful successor in the typewriter business and the good will thereof of two Remington corporations,—E. Remington & Sons, and Remington Standard Typewriter Manufacturing Co. The former was incorporated in 1865, for the manufacture of guns, etc., and its typewriter business was founded in the year 1873 and the latter in 1886.

Record pp. 663–666, 730, 753–757, 768–780, 40, 42.

a. That the manufactory and works of the Respondent were established at Ilion, N. Y., by said E.
5 Remington & Sons Corporation, at which place the business has ever since been located and carried on.

R. pp. 665, 72, 73, 96, 97.

b. That the capacity of the works has been from time to time greatly increased and the quality of the machines improved to meet the demands of a constantly growing business, which always has been, and now is, the largest and most valuable typewriter business in the world.

R. pp. 72, 73, 79, 95, 96, 97.

c. That the Respondent's typewriter was the pioneer writing machine, and has always been one
6 of the foremost in reputation for good construction, and most favorably known to the public.

R. pp. 61, 62, 101, 207.

d. That the writing machines of Respondent and its predecessors have for many years been known to the trade and to purchasers and users of writing machines as the "Remington" and "Remington Typewriter," and have been so designated, advertised for sale, offered for sale, and bought and sold, and said name became, was and is the trade denomination of Respondent's machines and business.

R. pp. 235, 236, 64-66-92, 141, 165, 190, 206, 272, 288.

e. That at the time the Petitioners and their predecessors entered the typewriter field, Respondent's typewriting machines were associated in the public mind with the name "Remington," so that the ordinary purchaser was likely to assume that the machines offered him for sale and bearing the name "Remington" had come from the establishment founded by the Remingtons at Ilion, N. Y., to whose typewriter business Respondent's predecessor succeeded in the year 1886 and the Respondent in 1892. 7

Petition pp. 49, 50, 51, 53, 54, 58, 72. R. 482, 487, 510–518, 999, 1,000.

f. That in and by an assignment in writing, dated March 22d, 1886, the said E. Remington & Sons Corporation, duly assigned, transferred and set over unto Respondent's predecessors, all rights, interests, privileges, franchises, tools, machinery, patterns, goods, wares, merchandise and property which the said E. Remington & Sons had held or owned in and about the manufacture, use or sale of typewriting machines, which transfer included and conveyed the good will, trade-names and trademarks used in said business, and in connection with the manufacture and sale of typewriting machines, and that said E. Remington & Sons, covenanted and agreed that they would not thereafter engage in the manufacture of typewriting machines of any name or character for a period of ten years from the date of said assignment. 8 9

R. pp. 716–723, 734, 745.

g. That shortly after said sale, assignment and transfer of said typewriter business was made by said E. Remington & Sons Corporation to Respondent's predecessor the said E. Remington & Sons Corporation became insolvent, its property and assets went into the hands of a Receiver and said corporation was subsequently dissolved and ceased to exist.

R., p. 81.

10 *h.* That prior to the year 1894, Respondent and its predecessors were the only Remington concerns that had ever been engaged in the manufacture and sale of typewriting machines, and the only concerns that had ever used the name "Remington" in connection with the manufacture or sale of typewriting machines.

R., pp. 61, 62, 101, 410.

i. That long prior to the time when Petitioner's predecessor, The Remington-Sholes Typewriter Co. was organized and entered the typewriter field, the Respondent and its predecessors placed the name "Remington" conspicuously upon their machines,
11 and had extensively advertised the same in catalogues and other advertising *media* as the "Remington" typewriter.

Petition, pp. 53, 54, 58, 72. Petitioner's Brief, p. 3. R., pp. 120, 141, 148, 190, 275, 283, 329, 336.

j. That while it is true that the word "Standard" and the trade-mark consisting of a red seal have been used upon Respondent's machines and to some extent in advertising *media*, the evidence in the record leaves no possible room for doubt that in the trade, and to the ordinary purchaser and user of typewriting machines, Respondent's product for a
12 great many years has been known as the "Remington" typewriter, and identified, bought and sold by that designation.

R., pp. 210-232, 272-275-279, 316.

k. That in arguement in the Courts below, the Petitioner's Counsel admitted that the name "Remington" was a by-word for good workmanship the world over, and that when the Remington-Sholes Company and its predecessor entered the field, Respondent had a world-wide reputation.

Petition, pp. 52, 54, 64, 65, 72.

l. And Respondent avers that its reputation was 13
accrued through the manufacture and sale of the Remington Typewriter.

2. That the Petitioner Fay-Sholes Co., formerly known as the Remington-Sholes Co., was in truth and in fact but a re-organization of the Remington-Sholes Typewriter Co., which latter Company was incorporated in or about the month of May, 1894.

R., pp. 430, 431. Petitioner's Brief, p. 7.

3. That in or about the year 1892, one Zalmon G. Sholes made a model typewriting machine, which he designated "The Z. G. Sholes." This model was destroyed by fire, and another model machine was subsequently constructed on the same general 14
lines.

R., pp. 390, 391, 392; Pet., p. 64.

a. Prior to the construction of these two models, Sholes had made certain alleged improvements which were embodied therein, and for which applications for Letters Patent of the United States were filed. Several persons were interested with Sholes in the model machine and the alleged improvements contained therein.

R., pp. 391–396; Pet., pp. 59, 60.

b. In or about the month of April, 1893, Sholes and his associate owners, organized a corporation 15
under the laws of the State of Wisconsin, the capital stock of which was ultimately fixed at $100,000. This company was organized to manufacture and sell typewriting machines, similar in construction and mode of operation to "The Z. G. Sholes" model. The corporation and model machine were named respectively "The Z. G. Sholes Co." and "The Z. G. Sholes" typewriter. After the formation of the Company, and some preliminary steps were taken in the way of making tools and machinery to be used in the manufacture of machines embodying the features illustrated in said model,

16 Sholes' associates declined to proceed further with the undertaking, in consequence of their inability to provide sufficient capital to manufacture the machine for sale.

R., pp. 397, 398, 389, 401.

c. Shortly thereafter Sholes became acquainted with Messrs. Carver and Franklin Remington, who at that time were contractors engaged in excavating a portion of the Chicago Drainage Canal.

R., pp. 401, 402, 412.

d. These two Remingtons were the sons of one Samuel Remington, who at one time, was an officer
17 and director of E. Remington & Sons Corporation, but had never been engaged personally in the manufacture or sale of typewriting machines, and had no knowledge of or skill in the business and was hostile to the typewriter enterprise of said corporation.

R., pp. 38, 43, 55, 57, 100, 101.

e. On the 26th of August, 1893, the Remingtons became jointly interested with Sholes in the model machine and the stock of "The Z. G. Sholes Co."

R., pp. 825–827.

f. After the Remingtons acquired their interest in this model, the alleged improvements therein and
18 stock of "The Z. G. Sholes Co.," they in company with Sholes visited Ilion, N. Y. and New York City for the purpose of disposing of their interests in said model, etc., and, among others, endeavored to dispose of said model, to the Remington Arms Co., and to the Respondent herein.

R., pp. 414, 415.

g. At that time neither the Remingtons nor Sholes had any idea of engaging in the manufacture of typewriting machines. They had no knowledge of or skill in that business.

R. pp. 412, 414.

h. Failing in their endeavor to interest Eastern capitalists in their model machines, etc., they returned to Chicago, and there sought to interest capitalists, and began the promotion of a Company which was subsequently organized as the Remington-Sholes Typewriter Co. 19

R., pp. 417, 418. Pet., p. 60.

i. Shortly after Sholes and the Messrs. Remington returned to Chicago, and in or about November, 1893, the name of the model was changed from "The Z. G. Sholes" to the "Remington-Sholes"; the designation of the model being changed because the name "Remington" was famous in typewriter manufacture, and had been used in connection with Respondent's business and typewriting machine. 20

R. pp. 417, 418, 426. Pet. pp. 64, 65.

j. Prior to the organization of the Illinois Corporation, hereinafter mentioned, the Remingtons alleged that they had expended in the purchase of interests in the model machine, inventions, etc., about $8,000 or $9,000, and, in addition to this sum, $6,000 or $7,000 were spent for salaries to Sholes and the mechanic, who made some slight changes in the model, for travelling and other expenses, attorneys' fees, etc., amounting in all to about $15,000.

R., pp. 412, 413. 21

k. At no time prior to the organization of the Remington-Sholes Typewriter Co., were any typewriting machines manufactured, advertised for sale, offered for sale or sold by Sholes and the Remingtons or either of them, under the name "Remington-Sholes," or any other name. They had never carried on any typewriter business and did not possess the good-will of any such business, prior to the organization of the so-called Remington-Sholes Typewriter Co. in May, 1894.

R., pp. 390-392, 397-401, 403-406, 410.

22 *l.* In the Spring of 1894, Charles Norman Fay and Franklin H. Head, two large capitalists, became interested in the model machine, etc., and an Illinois corporation was formed, the promoters selecting therefor the name "Remington-Sholes Typewriter Co."

R., pp. 406-409.

m. The Remingtons and Sholes became stockholders of that corporation, and for the purpose of making the stock full paid, the whole capital stock, consisting of 1,500 shares of the par value of $150,000, was issued to Sholes and the two Remingtons, in proportion to the interest, which they respect-
23 ively held in the model machine, etc.

R., pp. 406-409.

n. Fay was chief promoter of the corporation, and directly after its organization received one-third of the capital stock—$50,000—as compensation for his services in organizing the Company. No cash was paid by Sholes or by the Remingtons for the stock for which they subscribed.

R., pp. 407, 409.

o. Shortly after the corporation was organized its capital stock was increased to $250,000. This $100,000 worth of stock was taken by Fay, Head
24 and others, to furnish capital with which to start the business of the Company.

R., pp. 406, 407, 839.

p. While in the preliminary organization of the Company, its stock was mainly issued to the Remingtons and Sholes, nevertheless by the subsequent increase of the amount of stock and the transfer thereof, the control of the Company passed into the hands of Fay and others as appears in and by the Certificate of dissolution of the Remington-Sholes Typewriter Co.

Record, pp. 422, 835-842.

q. Fay personally and as trustee held a majority of the capital stock of the Company. Sholes and Carver Remington held a few shares of the stock and Franklin Remington about 250 shares thereof.

R., p. 838.

r. This Company first placed its typewriting mamachine upon the market under the name and designation "Remington-Sholes" in December, 1894.

R., p. 410.

s Neither of the Remingtons nor Sholes had previously been engaged in the typewriter business nor did either of the Remingtons at any time make any inventions or improvements in typewriters.

R., pp. 58-60, 100, 101, 412.

t. Fay was the principal promoter and organizer of the Remington-Sholes Typewriter Co., and after its organization became the principal stockholder thereof.

R., pp. 408, 409, 838.

u. That Fay and his associates knew the value of the name "Remington" at the time they selected and appropriated it, is clearly established by the surrounding circumstances and by evidence in the case.

R., pp. 447, 419. Pet,. pp. 64, 65. [redacted].

v. The allegation, in sub-division 3, of the petition, that Franklin Remington expended some $15,000 in the *re-construction* of the Sholes model is erroneous, as the evidence clearly establishes the fact that the model as originally constructed by Sholes was not materially changed after the Remingtons acquired their interest therein, and was not reconstructed or rebuilt before the organization of the Remington-Sholes Typewriter Co.

R., pp. 390, 391, 400, 401, 413.

28 *w.* That after the organization of the Corporation and in preparing the machine for the market some changes in details were made.

R., pp. 411, 434.

x. That while it is true that Zalmon G. Sholes' father was one of the early originators of improvements in typewriting machines, and Franklin Remington's father was at one time an officer and stockholder of E. Remington & Sons Corporation, it is not true that either one of them ever *personally* engaged in the manufacture or sale of typewriting machines; and Respondent further says that their association and repute, whatever it may have been
29 in connection with typewriting machines, rested with the Respondent's predecessors, and is now vested in Respondent as the successor to said typewriter business.

R., pp. 38, 43, 55, 56, 57, 60, 61, 42, 43.

g. That no two names could have been selected from the vocabulary of the world and applied to a writing machine, which were so well calculated to injure and divert the good will of Respondent's business as the names "Remington" and "Sholes," and the evidence in the record shows that this fact was fully appreciated and availed of by the promoters and organizers of the Remington-Sholes
30 Typewriter Co.

R., pp. 447, 419, 881, 973, 983, 889, 886.

4. That the Remington-Sholes Typewriter Co. continued to manufacture, advertise for sale and sell typewriting machines, marked, designated and advertised as the "Remington-Sholes" typewriter, until 1897 when it was reorganized as and under practically the same name, "Remington-Sholes Company."

R., pp. 436, 437, 1103, 1109.

a. After the re-organization and incorporation of the Remington-Sholes Typewriter Co., in 1897, the designation "Remington Sholes" was abbreviated to "Rem-Sho," but the name "Remington-Sholes" was always used on the machines in connection with the abbreviation, and was used in catalogues and advertisements and on signs, and the machines continued to be called and designated "Remington-Sholes" by dealers and agents, and continued to be known in the trade and to the public by the same designation. 31

R., pp. 1031, 1032, 1082, 1093, 1097, 524, 530, 27, 1352.

b. Respondent further says that the allegation of the petition (sub-division 4) that the Remington-Sholes Typewriter differed in external appearance, finish and design from the machines of Respondent is not of force, because, *first*, the ornamental bronze frame, etc., adopted and used by the Remington-Sholes Typewriter Co. was subsequently abandoned, and the machine japanned in black so that in external appearance and finish it quite closely simulated the design and finish of Respondent's machine. 32

R., pp. 555, 556.

And *secondly*, the evidence establishes the fact that the ordinary purchaser of typewriting machines relies upon the name and repute of the machine, that he is not familiar with the details of structure of writing machines and is unacquainted with their physical characteristics. That comparatively few purchasers are operators, and it is the rule in the larger cities that the business man does not even examine the machine which he purchases. 33

R., pp. 448, 449, 451, 452, 543, 544, 549, 550, 606, 607.

34 *c.* That in respect to the allegation of the petition (sub-division 4) that the Remington-Sholes Typewriter Co. and its successors and the Petitioner had at all times scrupulously sought to avoid any confusion as to the identity of their machines and business with those of Respondent, this Respondent says, that the alleged cautionary matter referred to and quoted from Petitioners catalogue was printed in said catalogues near the end thereof, which catalogue the evidence shows the public and purchasers seldom or never read. Moreover in many of said catalogues on the back side of the title page as well as in other advertisements and publications, the petitioners stated and asserted that the Remington-
35 Sholes machine was the "Only machine now made by a REMINGTON." "Strong, reliable and accurate, it represents the SECOND GENERATION of typewriter manufacturers bearing this great name." These statements were also frequently made orally by agents and dealers.

d. In their instructions to agents and dealers, Petitioners said: "The machine has now been fully explained and it remains with the salesman to add such other interesting facts such as the history of the Company, the connection of our Mr. Remington with this machine (Remington-Sholes) *and the relation to the old Remington Standard;* the fact that
36 this is a SECOND GENERATION of typewriter builders, that *the same standard of excellence is being maintained in the manufacture of this machine as all other goods which have been produced by the Remingtons.*" These statements, together with the frequent assertions of Petitioners' agents and dealers that the Remington-Sholes machine was the new and improved Remington and the genuine Remington typewriter, were freely circulated by agents and dealers of Petitioners to the injury of Respondent's business.

R., pp. 1197-1199, 973, 908, 909, 1028, 1029.

e. Furthermore the cautionary notice quoted, 37
substantially admits that the use of the name "Remington-Sholes" was calculated to confuse and mislead the public, otherwise no explanation would have been necessary. This notice like many others made by Petitioners contains misstatements of fact in that it alleges that Zalmon G. Sholes' father was the original inventor of the Remington Standard Typewriter. It is shown by the evidence in the case that he was only one of several persons who orignated the first model of the Remington machine. It is also asserted in said notice that Franklin Remington is the son of the original manufacturer of the well known typewriter which bears his name. This statement is incorrect inasmuch as the 38
Remington typewriter was manufactured and sold by E. Remington Sons Corporation, during the time that Samuel Remington, the father of Franklin Remington was connected therewith.

R., pp. 205, 206, 857, 858, 61.

f. The purpose of these and other untruthful statements was to associate the Remington-Sholes Co. and its product with the old Remington concern whose successor in typewriter manufacture, Respondent was and is. The intent of the Petitioners and their agents and dealers was to create in the mind of the public the belief that they were the successors to the business of the old Remington 39
concern, or that the Remington-Sholes Co. was a branch thereof and that their machine was the real Remington or the new and improved Remington Typewriter.

R., pp. 881, 973, 983, 972, 997, 999, 1000.

5. In respect to the allegations of sub-division 5, of the petition, Respondent says, that the alleged decision of the German Courts therein referred to was not introduced in evidence nor was any proof made in respect thereto; that the action was a civil proceeding by the firm of Glogouski & Co., of Berlin, against one Henry Newald of the same City under the CIVIL CODE and TRADE MARK LAWS of the

40 GERMAN EMPIRE. Glogouski & Co., were the exclusive resident dealers for Germany of Respondent's machines, and Newald was a dealer, selling the so called Remington-Sholes typewriter in Germany. Glogouski & Co., being resident dealers of Respondent's machines had, as required by the *German Trade Mark Law*, registered the name "Remington" as a trade-mark for the machines that they were selling. Newald was selling the machines of the Remington-Sholes Typewriter Co., with the name of that concern upon them. It was an AFFIDAVIT CASE. No witnesses were examined in Court or depositions taken in the usual way, nor were any of the affiants cross examined. Glogouski
41 & Co's., case was meagrely and imperfectly presented by affidavits, while Newald was furnished with sundry *affidavits* by the Remington-Sholes Typewriter Co., which not only stoutly denied Glogouski & Co's., right to use the name "Remington" upon or in connection with the sale of the typewriting machines, but also contained many other gross misstatements of fact. The Court ultimately came to the conclusion that inasmuch as Newald dealt exclusively in the goods of an AMERICAN firm which bore the name Remington-Sholes Typewriter Co., he could not under the special provisions of the GERMAN TRADE MARK LAW, in view of the convention existing between the German
42 Empire and the United States, be prevented from selling the writing machines of the Remington-Sholes Typewriter Co. The *parties* to that proceeding, the *issues* involved therein, and the *law* applicable thereto were wholly indifferent from those in the case at bar.

The decision of the German Court having arisen under the special provisions of the GERMAN TRADE MARK LAW is not of force here and cannot be availed of by the Petitioners as an authority in this Case.

Hohner v. Gratz, 50 Fed. Rep. 369; City of Carlsbad vs. Kutnow, 68 Fed. Rep. 794; S C. App. 71 Fed. Rep.

6. In respect to the allegation contained in subdivision 6 of the petition, Respondent says that the bill of complaint herein alleged that the Howe Scale Co., had been guilty of fraud and unfair competition, in that it had used the names "Remington" and "Remington-Sholes" as well as the corporate name "Remington Sholes Co." and the abbreviated name "Rem Sho" upon and in connection with the manufacture of Petitioners writing machines. 43

Record p. p. 8 & 9.

a. Respondent avers that the dissent of Judge Wallace, from the majority opinions of the Court of Appeals of the second circuit was in respect of *matters of fact only* and not in regard to any *legal proposition* enunciated in said opinions 44

Petition p. 66, et. seq.

b. That in his opinion Judge Wallace admits that "doubtless some careless purchasers have been misled and some unscrupulous dealers have traded on the resemblance imparted by the word Remington." . . . . . That "if the defendant had selected its name for the purpose of unfair competition in trade with the Complainant the question whether the collocation of the word Remington with other words did not suffice to distinguish its name from the Complainant's name would be of little importance." 45

And again when speaking of the right of Franklin Remington to use his own name in the corporate designation, "Remington-Sholes Typewriter Co." he qualifies such right to use the same with the limitation, "provided it is (was) not chosen as a cover for unfair competition."

c. The learned Judge also apparently overlooked the fact that the Respondent's predecessors acquired the *whole typewriter business of E. Remington & Sons Corporation*, including the good will, trade-names and trade-marks used in connection with the manfacture and sale of the Remington typewriting machines.

46 He also apparently overlooked the fact that Respondent's predecessor registered the name "Remington" in the United States Patent Office, that it used the name "Remington" conspicuously upon the paper table of its machines, and that its machines were advertised, designated and sold as the Remington, and long prior to the organization of the Remington-Sholes Typewriter Co. had become generally known as the Remington Typewriter.

d. Judge Wallace also appears to have overlooked the fact that the evidence in this case establishes that the ordinary purchaser of writing machines relies upon the name "Remington" which has been
47 so long and exclusively identified with Respondent's business as to inform the public that the name upon typewriters meant that they were the product of the old Remington factory and of Respondent, and that the ordinary buyer of typewriters is unacquainted with the external appearance and physical characteristics of the machines, and in purchasing relies upon the name and repute of the machine which he desires to purchase.

e. The learned Judge also seems to have found that the Remington-Sholes Typewriter Co. was the successor in business of another concern of which the Remingtons and Sholes were the owners.

48 This finding or statement of fact could only refer to the Z. G. Sholes Co., which Petitioners assert in their brief *never made or sold any typewriting machines or had any business* (Petitioner's brief, p. 4), and this contention is in accordance with the majority opinion of the Circuit Court of Appeals, wherein it is said that "prior to the formation of the Remington-Sholes Typewriter Co. no machines had been sold or offered for sale. Two or more had been made as models, and the name was then changed from "Z. G. Sholes" to "Remington-Sholes," but the new name had not become associated with the machine except in the talk of the future corporators among themselves; the public

know nothing of any such name in connection with a typewriter, indeed did not know the junior Remingtons or even Sholes as a producer of typewriters."

Petition, p. 64.

f. Furthermore, Judge Wallace also appears to have been under the erroneous impression that the machines had been introduced to the public prior to the organization of the Remington-Sholes Typewriter Co., for he says that it was natural that those who had invented the machine and given all their time and means *in introducing it to the public* when they came to organize a corporation, ... should choose their own name as a corporate name."

Petition, p. 69.

The machine was not introduced to the public prior to December, 1894 and perhaps later.

R. pp. 410, 1110.

g. Respondent further answering says that it is informed and believes that the decree entered by the Circuit Court of the District of Vermont was so made and entered in strict accordance with the mandate issued to said Court by the Circuit Court of Appeals as by reference to a copy thereof duly authenticated hereto annexed will more fully appear.

h. Respondent admits that it has furnished some of its agents and dealers with copies of the decree made and entered by the Courts below for their information and guidance, but denies that it has widely published or advertised in the United States or in foreign countries the finding of the Circuit Court and Court of Appeals that the Petitioners had been guilty of a fraudulent infringement and invasion of Respondent's rights and of an unfair and inequitable competition.

52 7. This Respondent admits that the Remington-Sholes Company assumed and conducted the defense of this action as alleged in the petition. That about the time the decision of the United States Circuit Court of the District of Vermont was handed down the Howe Scale Company gave up its agency and ceased to sell typewriters, and that shortly thereafter said Remington-Sholes Co., changed its corporate name to Fay-Sholes Co. and the name of its machine to the "Fay-Sho" typewriter; and it further says that shortly thereafter the said Franklin Remington ceased to be an employee or alleged manager of the said Fay-Sholes Co.; that he abandoned the typewriter business, and
53 removed to New York City, where he became the President and Manager of a corporation organized under the laws of the State of New York known as the Foundation and Contracting Company, and that said Remington has ever since been engaged in the business of said Company. In this connection Respondent begs leave to refer to the affidavits of Henry D. Donnelly and others, hereto annexed forming a part of this answer.

8. That in respect of the suit now pending in the United States Circuit Court of the Nothern District of Illinois, referred to in sub-division 8 of the petition, Respondent says that said cause has already
54 been disposed of by the stipulation of the parties and the order of said court, except as to the matter of an accounting, it having been stipulated and ordered that in case of an affirmance of the decree of the Circuit Court by the Appellate Court, the case should at once proceed to an accounting.

9. Respondent admits that the machines of the Fay-Sholes Co., formerly the Remington-Sholes Co., have been sold in many foreign countries, some of which are montioned in the petition, and it avers that the unfair trading and fraudulent acts and advertisements of unscrupulous agents and dealers of the Petitioner, Fay-Sholes Co., have seriously

menaced and injured its business, in that the ma- 55
chines of the said Remington-Sholes Co. now the Fay-Sholes Co. have been advertised, represented and designated, as :—

"The Remington-Sholes Typewriter."
"The Remington-Sholes Standard Typewriter."
"Remington Imperial Typewriter."
"Remington Typewriters" called "Remington-Sholes."
"New Model Remington."
"Remington Machine."
"These Genuine Remingtons made by Remington-Sholes."
"The only typewriter manufactured to-day 56
by a REMINGTON."
"It represents the SECOND GENERATION of typewriter manufactured bearing this great name."
"The only machine made by a REMINGTON."
"The New Remington-Sholes."
"The Remington-Sholes Typewriter the only machine now manufactured by Mr. Remington."
"Mr. Franklin Remington son and grand son of the old and celebrated American house, is the only member of that family 57
now engaged in the manufacture of a typewriter."

Many other statements of similar import have been made and advertised by Petitioners and their agents and dealers.

R. pp., 1027, 1042, 1044, 1114, 1116, 1197–1199, 1256, 1257, 1272, 1273, 1460, 1464, 882–885, 888–899, 901, 908, 909, 957, 958, 972, 973, 978, 979, 983, 986, 997, 1002.

58 *a.* That no suits have been threatened in foreign countries as alleged, except in cases where Petitioners' agents, and dealers were offering for sale or advertising for sale the Remington-Sholes Typewriter, as and for Respondent's machines, or in cases where they were attempting by unfair means to filch the good will of Respondent's trade and business, which is a large and very valuable one in the countries referred to in the petition.

b. That the suit pending against the alleged dealer in Rotterdam, Holland was instituted for the purpose of compelling said dealer to desist from the use of the name "Remington", which he used
59 *alone* on his sign and in a manner that was calculated to mislead the public, and to palm off the "Fay-Sholes" machines as and for Respondent's.

c. Respondent further says that it is informed and believes that if the Petitioner, Fay Sholes Co., is in nowise responsible or accountable for the acts and publications of its foreign agents and dealers. then the allegations contained in sub-division 9, of the petition are wholly irrelevant and immaterial, and furnish no ground whatever for the interposition of this court in respect of Petitioners foreign business.

60 10. Respondent is informed and believes that the Petitioners misinterpret and misapprehend the findings of the Court of Appeals as set forth in the majority of opinion of said Court; and it avers and insists that said Court held and found that the Petitioner, Howe Scale Co. had been guilty of a fraudulent infringement and invasion of the rights of Respondent, and had inaugurated an unfair and inequitable competition in business.

Petition pp. 49, 51, 54, 62, 65, 73.

The Courts below held that in organizing the Remington-Sholes Typewriter Co., the corporators

thereof intentionally selected the name "Reming- 61
ton" in order to compete with Respondent in its typewriter business and to divert Respondent's trade by confusing the identity of the products of the Remington-Sholes Typewriter Co. with Respondent, and that the Petitioner Remington-Sholes Co., and its predecessor chose the name "Remington" unnecessarily and for the purpose of unfair competition. This was in substance and effect the finding of both the Circuit Court and the Circuit Court of Appeals. Both Courts found that the Remington-Sholes Typewriter Co. was formed with a deceptive name, and that the name "Remington" was selected and adopted for the purpose of fraud and unfair competition; and Respondent further avers upon 62
information and belief that the question of whether the Remingtons might not have given their names to a corporation in certain circumstances and under certain conditions was not an issue in this case inasmuch as the Courts below found as a fact that the name "Remington" was taken by the Remington-Sholes Typewriter Co. and the petitioners for the purpose of fraud and to get the advantage of the great reputation which had attached itself to this Respondent and its product.

11. This Respondent further answering, says that the designation by personal names of some corporations that are engaged in the manufacture and sale 63
of typewriters is not peculiar to typewriter manufacture, nor is it material herein that some typewriting machines upon the market bear the names of the inventors thereof and others those of the the manufacturers of such machines. Suffice it to say that no custom could justify or sanction the fraudulent selection and use of Respondent's trade-name by Petitioners.

a. And Respondent further says that most of the large corporations in this country have adopted and use impersonal corporate names, and that many corporations engaged in the manufacture and sale

64 of typewriting machines have adopted and used such corporate names for their business. For example, corporations have been organized for the manufacture and sale of typewriting machines under the following names:

American Typewriter Co.
American Writing Machine Co.
Columbia Typewriter Mfg. Co.
Manhattan Typewriter Co.
Sun Typewriter Co.
Union Typewriter Co.
Union Writing Machine Co.
Hartford Typewriter Co.
National Typewriter Co.
65 Standard Typewriter Co.
Standard Typewriter Mfg. Co.
Monarch Typewriter Co.

And others might be added to this list.

b. And further answering, Respondent says that many corporations and concerns have manufactured and sold their products under impersonal names, as for example:

"Automatic" typewriter.
"American" typewriter.
"Boston" typewriter.
"Bar-Lock" typewriter.
66 "Caligraph" typewriter.
"New Century" typewriter.
"National" typewriter.
"Chicago" typewriter.
"Crown" typewriter.
"Columbia" typewriter.
"Commercial Visible" typewriter.
"Duplex" typewriter.
"Empire" typewriter.
"Hartford" typewriter.
"International" typewriter.
"Ideal" typewriter.
"Keystone" typewriter.

"Manhattan" typewriter. 67
"Monarch" typewriter.
"Pittsburg Visible" typewriter.
"Peoples" typewriter.
"Rapid" typewriter.
"Sun" typewriter.
"Union" typewriter.
"Victor" typewriter.
"World" typewriter.
"Waverly" typewriter, etc.

c. Respondent, further answering, says that while it is true that the name "Remington" had acquired repute in the gun industry before the advent of Respondent's typewriting machines, it is equally 68
true that Respondent and its product had, under the name "Remington," achieved a world-wide reputation before the Remingtons and Sholes lent their names to the Remington-Sholes Typewriter Co., as heretofore alleged.

R., pp. 72, 73, 79, 95, 96, 97, 211, 212.

d. That whatever of value, in connection with typewriting machines, attached to the name of the father of Zalmon G. Sholes was associated with and became vested in Respondent's predecessors; and Respondent denies that the adoption of the name Remington-Sholes Typewriter Co. or Remington-Sholes Co. as corporate names, or the name "Rem- 69
ington-Sholes" or "Rem-Sho" as a name for their product was reasonable, honest or fair, and avers that the name "Remington" was selected and appropriated without right as against Respondent and for the purpose of fraudulent and unfair competition.

12. And Respondent, further answering said petition upon information and belief, denies that the said Remingtons had a right to lend or bestow the name "Remington" upon said corporation, organized by a body of associates and named by pro-

70 moters for the purpose of getting the advantage of the great reputation which had attached itself to Respondent's product and business; and Respondent avers upon information and belief that the decision and findings of the Court of Appeals was in effect that the name "Remington" was selected and adopted by the Petitioners and their predecessor for the purpose of fraud and unfair competition, and Respondent submits that no custom of trade could sanction the taking and use of Respondent's trade-name for the purpose of getting the benefit of its reputation and of filching the good will of its business.

71 13. Respondent, further answering, says that if the Petitioners herein have a right to bring this cause to this Court by an appeal from the decision of the Circuit Court of Appeals for the Second Circuit, as alleged in said petition, then a writ of *certiorari* such as is asked for herein, should be denied.

In re Tampa Suburban Ry. Co., 168 U. S., 583.

Respondent further says that it is advised and believes that the allegation of the petition that a much more full and adequate measure of relief may be afforded by *certiorari* than by appeal, is erroneous, as a case removed by *certiorari* is considered 72 and determined the same as if it had been carried by appeal or writ of error to this Court.

Hubbard *vs.* Todd, 171 U. S., 474.

14. Respondent, further answering, denies upon information and belief, that the cases cited and referred to in sub-division 14 of the petition or any other decision of this Court, authorizes the Petitioner's predecessor or the Petitioners to take, appropriate or adopt Respondent's trade-name, "Remington," for the purpose of inaugurating an unfair and fraudulent competition in business, and

avers that the Courts below held and found that the 73
Petitioner's predecessor and Petitioners had adopted and used the name "Remington" for purposes of fraud, and therefore enjoined the use thereof by the Howe Scale Co.

15. Respondent, further answering, says that the evidence referred to in sub-division 15 of the petition relates to advertisements and representations of agents and dealers, and among others to some in the foreign countries mentioned and referred to in sub-division 9 of the petition; that the typewriting machines of the Remington-Sholes Co., now Fay-Sholes Co., and those of Respondent were and are sold in competition in the markets of said foreign 74
countries, and that one of the questions considered by the Circuit Court in this case was whether or not the use of the name "Remington" upon Petitioner's machines and in their business was calculated to divert Respondent's trade or likely to mislead the ultimate purchaser, either in this country or in any foreign countries where the machines were offered for sale and sold in competition with Respondent's. That this evidence related to machines emanating from the Remington-Sholes Co., now the Fay-Sholes Co., and the real defendant in this action, which machines bore the name "Remington," placed there by the Remington-Sholes Co. And Respondent avers that the evidence was relevant as showing or 75
tending to show the effect upon Respondent's trade of putting the machines of the Remington-Sholes Co. into the markets of the countries named in sub-division 9 of the petition, or elsewhere, with the names "Remington-Sholes" and "Remington-Sholes Co." upon them, and advertising for sale, offering for sale and selling them in competition with Respondent's machines, everywhere known as the "Remington" typewriter, and its business as the Remington Typewriter Co.

Petition, pp. 48, 49; R., pp. 979, 661, 896, 786.

76 *a.* And Respondent further avers that the evi dence herein shows that the Remington-Sholes Co. put its machines into the hands of agents and dealers knowing that they were calculated to be used fraudulently by them to mislead and deceive the ultimate purchaser.

Petition, pp. 64, 65.
R., pp. 419, 424, 426, 447, 805, 806, 1444.

b. Respondent, further answering, upon information and belief says that whether the lower Courts admitted or rejected the testimony referred to in sub-division 15 of the petition is not material, as there was abundant other competent evidence in
77 the case to sustain the findings and the decree of the Courts below.

16. In answer to sub-division 16, of the petition Respondent says that it is informed and believes that there is no conflict between the decision of the German Imperial Supreme Court and that of the Court of Appeals of the second circuit; that said German decision was predicated upon the special Trade Marked Laws of Germany, and the particular facts and circumstances set forth in the *affidavits* of the parties to that proceeding, and that foreign adjudications as respects *torts* are not binding upon the courts of this country, and the grant-
78 ing of an injunction depends in part upon circumstances which vary in different jurisdictions.

a. Respondent further answering says that if the Petitioners can invoke the jurisdiction of this Court to protect the foreign trade of the Fay-Sholes Co., which they allege is in the hands of independent dealers, it would seem to follow that the Courts below had the right to consider the actions and doings of such foreign dealers for the purpose of determing whether or not they were likely to mislead and deceive the ultimate purchaser and palm off Petitioner's machines as and for Respondent's.

b. That the questions at issue in the case pending 79
in the United States Circuit Court for the Northern District of Illinois, except as to the matter of accounting, are under the stipulation made and order entered therein already determined by the decision of the Court of Appeals of the second circuit, and hence there is no danger of a multiplicity of suits as alleged in said petition.

c. Respondent is informed and believes that the question whether or not one can have the right to the exclusive use of a personal name as a trade mark was not an issue in this cause or determined by the Courts below. That the Courts below did, however, hold and find that the Petitioners had in 80
connection with the sale of typewriting machines made use of the name and designation "Remington-Sholes" and "Rem-Sho," and had sold and caused the typewriting machines of the Petitioners to be advertised for sale, offered for sale, and sold and delivered, by word of mouth and otherwise, under the name of "Remington-Sholes" typewriters and "Rem-Sho" typewriters.

And further that the sale by Petitioners of such typewriting machines under the name of and as "Remington-Sholes" typewriters constituted a fraudulent infringement and an invasion of the rights of Respondent and an unfair and inequitable competition in business. 81

Petition, p. 73.

d. Respondent denies upon information and belief that there is anything in the decisions of this Court in conflict with the decision and findings of the Circuit Court of Appeals, to-wit, that a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number, when it appears that such name was intentionally selected in order to compete with an established

82 concern under a similar name engaged in a similar business, and to divert the others trade to themselves by confusing the identity of the product of the competing concerns and leading purchasers to buy those of one for those of the other.

e. Respondent further avers that the allegation of the Petitioners that even if the Respondent were alone entitled to use the name "Remington" as a trade mark for typewriting machines, nevertheless Petitioners have not trespassed upon such right, since they have used only the names Remington-Sholes and Remington-Sholes Company, and have never used the name "Remington" alone, is not
83 of force, for the reason that the reports are full of cases where bills have been sustained for the infringement of one of several words of a trade-mark or where a trade-name has been used in connection with other words or names. Among other cases may be cited:

Saxlehner *vs.* Eisner & Mendelson Co., 179 U. S., 19, 33.

Menendez *vs.* Holt, 128 U. S., 514.

Wotherspoon *vs.* Currie, L. R. 5 H. L., 508.

Newman *vs.* Alvord, 51 N. Y., 189.

Amoskeag Mfg. Co. *vs.* Spear, 2 Sandf., 599.

84 Montgomery *vs.* Thompson, H. L. (1891) A. C., 217.

Manchester Brewery Co. *vs.* North Cheshire & Manchester Brewery Co., H. L., 15 Times, L. R., 110.

f. In the case at bar the Circuit Court held and found that connecting the name "Sholes" with Remington in the business of and on the machines would not, or might not, adequately indicate to a purchaser, who had known or heard of the Remington typewriters and wanted one, that these were not the original Remingtons such as were

wanted. The name, although linked with Sholes, would indicate Remington connection in typewriter production and imply the original manufacture. 85

Also the Circuit Court said: "The ultimate purchasers would be led to think that the addition of the name 'Sholes' was a new style of the old machine coming from the same source."

The Circuit Court of Appeals speaking by Judge Lacombe, said: "The defendant is the Remington-Sholes Co.; it marks its machines 'Remington-Sholes' and 'Rem-Sho,' and there can be no doubt upon the record that the use of the name "Remington" helps the sale of machines and induces many purchasers to suppose that such machines are the product of the old establishment at Ilion." 86

And, again the same Court said: "We have no doubt whatever that the name Remington was chosen because it was expected that it would naturally lead the public to suppose that the new corporation was either the *successor* or some *branch* of the old concern of which the Appellant's brief observes: 'The name Remington was admittedly a by-word for good workmanship the world over.'"

In the dissenting opinion of Judge Wallace it is admitted that: "If the defendant had selected its name for the purpose of unfair competition in trade with the complainant (a fact found by the Circuit Court and the Court of Appeals), the question whether the collocation of the word Remington *with other words* did not suffice to distinguish its name from the complainant's name would be of little importance." 87

g. Respondent further answering says that the allegation of the petition that the use of, the names of the Remingtons in the corporation—Remington-Sholes Typewriter Co., etc., in which they were stockholders, etc., was an ordinary, fair and reasonable use, and one sanctioned by long established custom, is denied by Respondent and is wholly displaced by the findings and decisions of the Courts

88 below, which found and held, substantially, that the name "Remington" was intentionally selected and used, in said corporate name and upon Petitioners product, in order to compete with Respondent and for the purpose of diverting its trade and to confuse the identity of the products and lead purchasers to buy Petitioners machines as and for Respondent's.

h. Respondent further says that no custom could justify or sanction the intentional adoption and use by Petitioners of its trade-mark or trade-name for purpose of diverting its trade and palming off the products of the Petitioners as and for Respondent's.

89

i. And Respondent further answering says that it does not admit that there exists any conflict in the decisions of the various United States Circuit Courts and State Courts in respect of the right of an individual to bestow his name upon a corporation as alleged in said petition. But even if there were conflict it is informed and believes that the matter referred to in the petition was not and is not an issue in this case, nor was it the ground of decision of the Courts below. That said Courts based their decisions and findings upon the fact established in this cause that the Corporators of the Remington-Sholes Typewriter Co. intentionally
90 and fraudulently chose the name "Remington" for the purpose of unfair competition in business and to get the advantage of the world-wide reputation of the name "Remington" in connection with Respondent's business and product.

Wherefore Respondent respectfully submits that Petitioner's application for a Writ of *Certiorari* in this case should be denied.

WYCKOFF, SEAMANS & BENEDICT.

By J. F. McCLAIN,

Secretary.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.: 91

J. F. McClain, being duly sworn, says that he is the Secretary of Wyckoff, Seamans & Benedict, the Respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

J. F. McCLAIN.

Subscribed and sworn to before me
this 9th day of November, 1903.

H. C. COLEMAN,
[SEAL] Notary Public, Kings Co., N. Y. 92
Certificate filed in N. Y. Co.

93

94

Exhibit A.

MANDATE CIRCUIT COURT OF APPEALS.

UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable the Judges of the Circuit Court of the United States for the district of Vermont.

GREETING:

Whereas, lately in the Circuit Court of the United States for the District of Vermont, before you, or some of you, in a cause between Wyckoff, Seamans & Benedict, and the Howe Scale Company,
95 a decree was entered in the office of the Clerk of said Court on the 14th day of August, 1901, in the words and figures following, to-wit:

"This cause coming on to be heard upon the pleadings and proof and after hearing Messrs. Henry D. Donnelly and Charles E. Mitchell, counsel for the Complainant, and James H. Pierce and Geo. P. Fisher, Jr., counsel for the defendant and due deliberation having been had thereon, it is ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree as follows, namely:

1. That since about the year 1873 the complainant
96 and its predecessors have been engaged in the manufacture and sale of typewriting machines which became well and favorably known and were marked and designated "Remington" machines.

2. That said writing machines were put upon the market by complainant and its predecessors and introduced, advertised for sale and popularized in this country and in foreign countries under the name of "Remington" and "Remington Typewriter" by which names they came to be widely known and identified by purchasers and the public, and which before the acts of the defendant, and its principal, "Remington-Sholes Company" in the

bill of complaint mentioned, had for many years 97
been continuously and exclusively used to designate and identify complainant's machines.

3. That prior to the acts complained of the complainant acquired and succeeded to the typewriter business, founded by E. Remington & Sons, including franchises, trade marks and good will thereof, and said business of manufacturing and selling typewriting machines was continued and largely increased and an important good will created and existed which was a source of great profits to complainant.

4. That the defendant Howe Scale Company of 98
1886, a corporation existing under the laws of the State of Vermont, has made use, in connection with the sale of typewriting machines, manufactured by the Remington-Sholes Company, a corporation existing under the laws of the State of Illinois, of the name and designation "Remington-Sholes" and "Rem-Sho," and has sold and caused the typewriting machines of said "Remington-Sholes Company" to be advertised for sale and to be offered for sale and sold and delivered by word of mouth and otherwise, under the name of "Remington-Sholes" typewriters and "Rem-Sho" typewriters.

5. That the sale by the defendant "Howe Scale 99
Company of 1886" of typewriting machines manufactured by or for said "Remington-Sholes Company" under the name of or as "Remington-Sholes" typewriters, or "Rem-Sho" typewriters, constitutes a fraudulent infringement and invasion of the rights of the complainant and an unfair and inequitable competition which equity will restrain.

6. That at the time this action was commenced the defendant "Howe Scale Company of 1886" was the general agent of the "Remington-Sholes Company" for the United States and that said last

100 named Company agreed to pay and has paid all expenses incident to the defense thereof, and agreed to protect and save harmless said defendant with respect thereto.

7. And it not appearing that the defendant as such agent has received any profits, gains and advantages which have arisen or accrued to it from the infringement of the said trade-name and designation "Remington," by using or selling typewriting machines having thereon the name "Remington" or the abbreviation "Rem" as the name or part of the name of said writing machines, and an account thereof is denied without prejudice to any
101 right of the complainant to recover the same of the principal, the "Remington-Sholes Company."

8. And it is further ordered, adjudged and decreed that an injunction be forthwith issued herein perpetually enjoining the defendant "Howe Scale Company of 1886," its officers, clerks, attorneys, agents, servants and workmen, and all persons acting in privity with it or them, or claiming through or under it or them, from in any manner whatsoever making use of the designation "Remington" or "Rem" as the name or part of the name of any typewriting machine whatsoever manufactured by said Remington-Sholes Company, or by
102 defendant, or by any person or concern, and from selling, offering, exposing or advertising for sale by means of signs, show cards, catalogues, circulars, publications, advertisements, or by word of mouth, or in any manner whatsoever, typewriting machines manufactured by said "Remington-Sholes Company," or by defendant or any person or concern under the name of or as "Remington-Sholes" or "Rem-Sho," or by any designation of which the word "Remington" or the abbreviation "Rem" shall constitute a part.

9. And it is further ordered, adjudged and decreed that an injunction be forthwith issued herein

perpetually enjoining the said defendant Howe Scale Company of 1886, its officers, clerks, attorneys, agents, servants or workmen, and all persons acting in privity with it or them, or claiming through or under it or them, from in any manner whatsoever making use of the word "Remington," or the abbreviation "Rem" as the whole or as a part of any name or designation whatsoever, which shall be marked upon or affixed or applied by any means to typewriting machines manufactured or sold by the said "Remington-Sholes Company," or by defendant or any person or concern, and used by it or them in connection with the manufacture and sale of its or their writing machines and to distinguish and identify the same. 103 104

10. And it is further ordered, adjudged and decreed that the said complainant do recover of the defendant its costs, charges and disbursements in this suit to be taxed by the Clerk of this Court, and that in default of the payment of the same the complainant have execution therefor, "Hoyt H. Wheeler," as by the inspection of the transcript of the record of the said Court which was brought into the United States Qircuit Court of Appeals for the Second Circuit, by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and three, the said cause came on to be heard before the United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel: 105

On consideration whereof it is hereby ordered, adjudged and decreed

That the decree of said Circuit Court be and it hereby is reversed without costs, and cause remanded with instructions to decree in favor of complainant only as to the name "Remington."

106 You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the decision of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of April, in the year of our Lord one thousand nine hundred and three.

(L. S.) WM. PARKIN,
Clerk of the United States
Circuit Court of Appeals,
for the Second Circuit.

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CLERK'S OFFICE, U. S. CIRCUIT COURT,
DISTRICT OF VERMONT.

BURLINGTON, October 28th, 1903.

I hereby certify that the above and foregoing is a true copy of the original hereof now remaining on file in my office.

(L. S.) (Sgd.) GEO. E. JOHNSON,
Clerk.

108

Exhibit B.

Affidavit H. D. Donnelly.

SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1903.

How Scale Company of 1886 and Fay-Sholes Company,
Petitioners.

vs.

Wyckoff, Seamans & Benedict,
Respondent.

United States of America,
State of New York,
County of New York, } ss.

Henry D. Donnelly, being duly sworn deposes and says that he resides in the Borough of Brooklyn, City of New York, and is Respondent's attorney and one of its counsel herein; that he knows Franklin Remington referred to in the petition herein, and knew him prior to November 1901; that in the year 1892, to wit:—about the month of September, he became cognizant of the fact that a corporation had previously been formed under the laws of the State of New York, known as the Foundation and Contracting Co. That his attention was drawn to this matter by the reason of the following facts and circumstances:— One Jules Breuchaud was and is the owner of Letters Patent of the United States relating to certain inventions and improvements in the construction of supports for walls, etc; that in or about the month of September 1892, deponent was informed by said Breuchaud that the said Foundation and Contract-

112 ing Co., and another concern were infringing his patent in the construction of a foundation for a building in the City of New York. After some correspondence and negotiations, deponent in behalf of the said Jules Breuchaud prepared a bill of complaint and suit was brought in the United States Circuit Court, for the Southern District of New York against the said Foundation and Contracting Co., *et al*, and the said defendants subsequently appeared in the suit and filed their answer therein. On an investigation of the circumstances attending the infringement of said patent and in the preparation of the bill of complaint, deponent acquired knowledge of the fact that the Foundation and Con-
113 tracting Co. was a corporation organized under the laws of the State of New York, and that the Cirtificate of incorporation was filed and recorded in the County Clerk's Office of the County of New York on the second day of April 1902.

That the three persons named Corporators and Directors in the said Certificate are Franklin Remington, Edwin S. Jarrett and Daniel E. Moran. and that the residence of Franklin Remington is stated to be 210 West 44th, Street, New York City. That the principal place of business of said corporation is stated to be located in the City and County of New York and that the object for which said Company was formed is stated to be to design, con-
114 struct, enlarge, extend, repair, complete, take down or remove or otherwise engage in any work upon bridges, piers, docks, foundations, etc.

That subsequent to the filing of bill of complaint in said suit, said Foundation and Contracting Co., made and filed its answer therein which answer was subscribed "Foundation and Contracting Co., by Franklin Remington, President," and deponent knows by correspondence with said Company and by personal investigation that the person who subscribed said answer as "Franklin Remington President" is the same Franklin Remington who is referred to in the petition in this case. That de-

ponent now has in his possession a letter which he received from the said Foundation and Contracting Co., relating to the matter for which suit is brought, bearing date of December 1, 1902, the printed heading of which letter is as follows: 115

DANIEL E. MORAN, C. E. EDWIN S. JARRETT, C. E.
FRANKLIN REMINGTON.

Foundation and Contracting Co.
35 Nassau Street,
Telephone: Cortlandt 3956 New York, Dec. 1, 1902.
HENRY D. DONNELLY.

Subscribed and sworn this Seventh day of November 1903. } 116

Katherine V. Donovan,
Notary Public, Westchester Co.
Certificate Filed in N. Y. Co.

117

118 **Exhibit C.**

Affidavit of H. E. HATCH.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

HOWE SCALE COMPANY OF 1886 AND FAY-SHOLES COMPANY,
Petitioners,

vs.

119 WYCKOFF, SEAMANS & BENEDICT,
Respondent.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
County of New York. } ss:

HAMLIN E. HATCH, being duly sworn, deposes and says that he resides in the City of Newark, N. J., and is now engaged in the sale of typewriting machines in the City of New York. That he was formerly in the employ of the Remington-Sholes Company. That deponent first entered the
120 service of the Remington-Sholes Company, in the Spring of the year 1898, and continued in the service of said corporation as a typewriter salesman and organizer of agencies and dealers until the year 1900, when he left the service of said Company. That in the year 1902, and after the corporation had changed its name to Fay-Sholes Company, he again entered the service of said Company, and continued therein until January 1st, 1903. That during such employment he became acquainted with Franklin Remington upon whom he recently made a social call and found in an office located at No. 35 Nassau Street, New York City. That the entrance door of said office bore the name "Foundation and Con-

tracting Company." That deponent had a short interview with Mr. Remington at said office No. 35 Nassau Street, and knows the person whom he there met to be the same person Franklin Remington, who was formerly connected with the Remington Sholes Company of Chicago. 121

HAMLIN E. HATCH.

Subscribed and sworn before me this 10th day of November, 1903.

KATHERINE V. DONOVAN,
Notary Public,
Westchester Co.,

[SEAL.]

122

Certificate filed in N. Y. Co.

123

124

Exhibit D.

Affidavit of JOHN H. MASON.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1903.

HOWE SCALE COMPANY OF 1886 AND FAY-SHOLES COMPANY,

125 Petitioners,

vs.

WYCKOFF, SEAMANS & BENEDICT,

Respondent.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.

JOHN H. MASON, being duly sworn, deposes and says that he resides at No. 25 East 104th Street, in
126 the Borough of Manhattan, City, County and State of New York. That on the 6th day of November, 1903, he called at the office of the Fay-Sholes Company, located at No. 300 Broadway, New York City, N. Y., and there made inquiry for Mr. Franklin Remington. That deponent was informed by a lady who was apparently in charge of the office that Mr. Franklin Remington was not there but was President of the Foundation and Contracting Company located at No. 35 Nassau Street, and that said company was erecting a building opposite to the office of the Fay-Sholes Company on Broadway, New

York City. She also stated that Mr. Remington 127
was not often at the office of said company. During deponent's visit to the office of the Fay-Sholes Company, he was also informed by one F. W. Payne, a salesman in the service of said company, that while Mr. Remington was still Vice-President of the Fay-Sholes Company, he took no active part in the management of the business at No. 300 Broadway. Deponent also visited the building known as No. 35 Nassau Street, New York City, and there ascertained from inquiry that the Foundation and Contracting Co. had offices in said building, and was also informed by employees of the building—hall man and persons who ran the elevators—that Franklin Remington was generally at the office of the 128
Foundation and Contracting Co., in said building, on business days, during the usual business hours. Deponent consulted a buiness directory of the City of New York, for the year 1903, and found that Franklin Remington was named therein as President and Director of the Foundation and Contracting Co., and also Vice-President and Director of the Wilson Refrigerating Machine Co., No. 478 Pearl Street, New York City, and was informed by a gentleman apparently in charge of said office, that Mr. Remington was not then there but that he came there on Monday, Wednesday and Friday morning of each week, and that he could always be found at the Foundation 129
and Contracting Co. office at No. 35 Nassau Street, New York City, as he was there all day. That deponent learned by inquiry at the office of Messrs. Geo. R. Read & Co., of No. 60 Liberty Street, New York, who as deponent is informed and believes are agents for the building at No. 35 Nassau Street, that the Foundation and Contracting Co. have been tenants in said building for about two years.

And deponent further says that he also ascertained from a personal visit to Greenwich, Conn., and inquiry there that Mr. Franklin Remington now

130 resides at No. 73 North Street, Greenwich, and has lived there for about two years.

JNO. H. MASON.

Subscribed and sworn this 10th day of November, 1903.

KATHERINE V. DONOVAN,
[SEAL] Notary Public,
Westchester Co.,

Certificate filed in N. Y. Co.

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